IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING

[Chapter VIII, Rule 32(2) (b)]
Description of case

Writ Petition No. 311 of 2006 (M/B) **Dated on: June 16, 2006**

A.F.R. (Approved for Reporting)
Not approved for Reporting

Date. 16.06.2006

(Initial of Judges)

Note: Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judges for signature.

Reserved Judgment

IN THE GIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 311 of 2006 (M/B)

M/s Erbis Engineering Company Ltd.
A duly registered company having their
Office at 2-E /12, 4th Floor,
Jhandewalan Extension, N. Delhi – 55.

..... Petitioner

Versus

1. State of Uttaranchal
   service through its Secretary,
   Medical Health & Family Welfare,
   Dehradun, Uttaranchal.
2. Director General,
   Medical Health & Family Welfare,
   State of Uttaranchal, Dehradun.
3. M/s Innovative Medicare Technologies
   Private Limited,
   SCO 28, 2nd Floor, Sector 33-D,
   Chandigarh.

..... Respondents

Mr. V.K. Kohli, Sr. Advocate with Mr. Lokendra Singh, Advocate for the petitioner.
Mr. N.C. Gupta, Standing Counsel for respondent Nos. 1 and 2.
Mr. B.C. Pande, Sr. Advocate with Mr. Naresh Pant, Advocate for respondent No. 3.

Coram: Hon'ble Rajeev Gupta, C.J.
Hon'ble Prafulla C. Pant, J.

Dt: June 16, 2006.

[Per Hon'ble Prafulla C. Pant, J.]

By means of this writ petition, moved under Article 226 of the Constitution of India, the petitioner has sought writ in the nature of certiorari quashing letter No. 15-P /

Upkaran Kray / 12/ 2005 / 10013 dated 20th March, 2006 (Copy Annexure –8 to the writ petition) issued by respondent No. 2, cancelling the alleged acceptance of tender of the petitioner regarding purcahse of Echo Cardiography machines. A mandamus has also been sought commanding respondent Nos. 1 and 2 not to purchase said machine from anyone else except from the petitioner.

2) We heard learned counsel for the parties and perused the record.

3) Brief facts of the case, as narrated in the writ petition, are that petitioner deals in supply of medical equipments manufactured by 'Thoshiba', which is a Japanese company. Respondent No. 2, Director General, Medical Health and Family Welfare, Uttaranchal invited tenders for supply of different machines including Echo Cardiography machines vide tender notice dated 14th November, 2005 (copy Annexure –1 to the writ petition). In response to said tender notice the petitioner, respondent No. 3 and a third party M/s Siemens submitted their tenders for supply of Echo Cardiography machines. The technical bids of the parties were opened on 6th December, 2005. The Purchase Committee of respondent No. 1, which included there senior Cardiologists, scrutinized the demonstration of the machine of petitioner and that of respondent No. 3. It is alleged by the petitioner that petitioner's machine had two Probes for cardiac scanning while that of the respondent No. 3 had only Probe. After opening of the technical bid on 6th December, 2005 and demonstration, the financial

bids were opened on 20th December, 2005. The bid of M/s Siemens was highest. That company did not turn up to demonstrate the machine, as such, its tender was not accepted. According to the petitioner, tender bid of respondent No. 3 did not comply with the specifications as per the requirement of the terms of the tender, hence, it should not be accepted. It is further alleged in the writ petition that the tender of the petitioner was accepted vide letter No. 15-P / Upkaran Kray / RC / 12 / 2005 4788 dated 14th February, 2006 (copy Annexure – 3 to the writ petition). The petitioner vide said letter was required to submit bank guarantee and he complied with the same. However, when no supply order was received, on 17th March, 2006, the petitioner drew attention of respondent No. 2 for follow up action in pursuance to the letter dated 14.02.2006. When on 20th March, 2006, the petitioner visited office of respondent No. 2, he came to know that respondent No. 2 has placed order for supply of five Echo Cardiography machines to respondent No. 3. On this, the petitioner immediately sent a letter of that date i.e. 20.03.2006 to the Principal Secretary, Medical Health and Family Welfare, Uttaranchal bringing facts to his notice, but letter No. 15-P / Upkaran Kray / 12 / 2005/ 10013 dated 20th March, 2006 (copy Annexure -8 to the writ petition) was served on the petitioner on 31.03.2006 intimating the cancellation of the letter of acceptance in favour of the petitioner. Aggrieved by said letter, petitioner has filed this writ petition.

4) The Joint Director in the office of Director General, Medical Health and Family Welfare, Uttaranchal filed

counter affidavit on behalf of respondent No. 2, while respondent No. 3 filed its separate two counter affidavits,

one shorter counter affidavit and another a detailed one. According to the counter affidavit filed by respondent No. 2, it is admitted that the petitioner was participant in the bid of purchase of Echo Cardiography machines but rest of the contents of the writ petition are not admitted by the answering respondent. It is stated that the technical bid of the petitioner as well as that of respondent No. 3 were accepted on 06.12.2005, but the financial bid of the respondent No. 3 being the lowest one, the financial bid of the respondent No. 3 being the lowest one, the financial bid of the petitioner could not be accepted. Respondent No. 2 has disclosed in his counter affidavit comparison of financial bids, as under:

L 1.	Innovative Medicare	Philips Brand (Res. No. 3)	Rs. 49,23,380/- Per unit
L 2.	Erbis Engineering	Toshiba Brand (Petitioner)	Rs. 69,78,574/- Per unit
L 3	Siemens Ltd.	Siemens Brand	Rs. 84,12,208/- Per Unit

According to respondent No. 2, equipments of both M/s Innovative Medicare and that of M/s Erbis Engineering were found as per tender specification by the Demonstration Committee, and technical evaluation report with financial comparative chart was sent to the Government of Uttaranchal for its approval. However, Since financial year was drawing close and there was urgent need of advance withdrawal of fund, a sanction was requested on 18th January, 2006 from Government of Uttaranchal for letter of credit sanctions which was received vide G.O. No. 57/XXVIII–5 122 / 02 (T.S.) II dated 25.01.2006 (copy Annexure No. C.A. –6 to the above counter affidavit). Since, advance withdrawal of

funds can be made in the case of foreign letter of credits, and Erbis Engineering had quoted their tender also in foreign currency, a letter of acceptance was issued to them in February 2006 for the reason that in case said company gets government sanction their letter of credit can be opened before the close of the financial year. However, financial sanction from the Government was received vide G.O. No. 170 / XXVIII –5-2006- 84 / 2005 (T.C.) dated 10th March, 2006 for purchase of the Echo Cardiography machines from M/s Innovative Medicare (respondent No. 3) as their tender was lowest one. In the circumstances, according to respondent No. 2, a formal letter of acceptance was issued to respondent No. 3, vide letter No. 15-P / Upkaran Kray / 12 / 2005 / 9414 dated 17th March, 2006 and formal agreement and contract was entered into with respondent No. 3. And, supply order was also placed vide order No. 15-P / Upkaran Kray / 12 / 2005 / 9712 dated 17th March, 2006 (copy Annexure No. C.A. –7 to the above counter affidavit) to said company.

5) The main averment in the counter affidavit of respondent No. 3 is that its tender, being lowest was rightly accepted by the respondent Nos. 1 and 2. In the short counter affidavit field by respondent No. 3 it has been denied that their equipment was in any way inferior to that of the petitioner. It is stated in para 22 of said counter affidavit that all the Probes, as required in the tender, were in the machine of respondent No. 3.

6) In the rejoinder affidavit, the petitioner has reiterated its averments made in the petition.

7) From the affidavits, counter affidavits and rejoinder affidavit filed by the parties it is admitted to them that respondent No. 2 invited tenders vide tender notice dated 15th November, 2005 (copy Annexure –1 to the writ petition) for the supply of different machines including Echo Cardiography machines. It is also admitted to the parties that M/s Erbis Engineering (petitioner), M/s Innovative Medicare (respondent No. 3) and M/s Siemens submitted their tenders for supply of aforesaid E.C.G. machines. It is also not disputed that on 6th December, 2005, the technical bids of the participants were opened. There is no dispute also as to the fact that the parties were invited to demonstrate their machines before the Purchase Committee. It is also clear that M/s Siemens did not turn up for demonstration. From the counter affidavit filed on behalf of respondent No. 2, it appears that the Purchase Committee after demonstration approved the machines of both the remaining participants i.e. M/s Erbis Engineering (petitioner) and M/s Innovative Medicare (respondnet No. 3) and proposals were sent to the Government, for its approval. Before the proposals were sent to the Government, on 20th December, 2005, financial bids were also opened. The petitioner nowhere has stated that its bid was lowest one. On the other hand, respondent No. 3 in its counter affidavit, has categorically stated that his financial bid was the lowest one. The respondent No. 2 has given the comparative chart of the financial bids showing that the petitioner's financial bid was Rs. 69,78,574/- per unit while that of respondent No. 3, M/s Innovative Medicare it is only Rs. 49,23,380/- per unit. The said comparison makes evident that there is difference of approximately more than Rs. 20 lakh per machine, which means for five machines, the difference would be more than a crore, in terms of

rupees. As such, acceptance of financial bid of respondent No. 3 cannot be said to be bad in the eyes of law.

8) Mr. V.K. Kohli, Senior Advocate appearing for the petitoner, vehemently argued that after acceptance of petitioner's bid, the respondent No. 2 cannot cancel the same, more so, without hearing them. In the counter affidavit of respondent No. 2, the issuance of alleged acceptance letter has been explained. It is stated in the counter affidavit that the financial year was drawing close and financial approval from the Government was awaited. In the circumstances, the alleged letter of acceptance was issued to the petitioner to facilitate withdrawal of the amount sanctioned, as petitioner's quotation was also in foreign currency. On behalf of respondent No. 2, it is replied by learned Standing Counsel for the State, that since financial approval from the Government was received by respondent No. 2 to purchase the machines from respondent No. 3, who submitted the lowest bid, as such, the respondent No. 2 had no option but to purchase the machines from respondent No. 3 only. We feel, that though unnecessary inconvenience has been caused to the petitioner by sending him the alleged letter of acceptance, but the act on the part of respondent Nos. 1 and 2 to place final order for supply for machines to respondent No. 3, cannot be said to be unjust and improper, as its financial

bid was the lowest one. Had there been the case that in the technical bid respondent No. 3 not cleared, the respondent Nos. 1 and 2 could not have been said to have acted fairly in placing order to said party, but in the present case, since, machines of both petitioner and respondent No. 3 were cleared by the Purchase Committee, which included

experts, as such, naturally final order for supply of machines had to go to the lowest financial bidder, out of the two.

9) On behalf of the petitioner it is further contended that the tender of the petitioner included the accessories with the machine and the annual maintenance contact, while the respondent No. 3, in its tender had not included the same. We have examined the dispute from that angle also. Even, after including the charges quoted by respondent No. 3 separately for accessories and maintenance etc., their bid is lowest by Rs. 5,00,000/- per unit, as against that of the petitioner, as such even this contention is of no help to the petitioner.

10) Assuming for a moment that after issuance of alleged letter of acceptance to the petitioner, the impugned order of cancellation of said acceptance is wrong, we are of the view that the discretionary jurisdiction under Article 226 of the Constitution of India need not be exercised in favour of the petitioner as by placing order to supply machines to the respondent No. 3, who was the lowest bidder, the Government has not acted unjustly. (***Reliance placed in chandra Singh and others Vs. State of Rajasthan and another, (2003) 6 Supreme Court Cases 545 at pg 562, para 43).***

11) We also feel it pertinent to mention here that during the arguments we are told by learned counsel for respondent No. 3, that in pursuance to the order to supply machines, respondent No. 3 had already supplied one machine out of the five, on 02.06.2006, and payment has been received on 05.06.2006. As such, now at this stage,

when the contract between respondent No. 2 and respondent No. 3 has been acted upon partly, on that ground also, we do not feel it just and proper to set aside the impugned order of cancellation of alleged letter of acceptance issued in favour of the petitioner.

12) Therefore, the writ petition is liable to be dismissed. The same is dismissed. No order as to costs.

(Prafulla C. Pant, J.) **(Rajeev Gupta, C.J.)**

Dt. June 16, 2006.
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